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Decided by: Chairman: Ambassador John Donaldson;
First Vice Chairman: Dr. Carlos Manuel Ayala Corao;
Second Vice Chairman: Professor Robert Kogod Goldman
Members: Ambassador Alvaro Tirado Mejia, Dr. Oscar Lujan Fappiano, Dean Claudio Grossman, Dr. Jean Joseph Exume.
Dated: 12 March 1997
Citation: Gardener v. Jamaica, Case 11.321, Inter-Am. C.H.R., Report No. 7/97, OEA/Ser.L/V/II.98, doc. 6 rev. (1997)
Represented by: APPLICANT: Michael P.D. Ellman Esq.
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I. ALLEGATIONS IN PETITION DATED MAY 10, 1994

1. On May 19, 1994 the Commission received a petition dated May 10, 1994, from Michael P.D. Ellman Esq., of Vizards Solicitors, Parliamentary Agents, and Privy Council Agents of London, United Kingdom, filed on behalf of Mr. Delford Gardener against the State of Jamaica for alleged breaches of the American Convention on Human Rights (hereinafter, "American Convention.") The Petitioner alleged that Mr. Gardener was convicted, and sentenced to death for the murder of Adrian Aird, who was killed on December 3, 1987. The Petitioner further alleged that Mr. Gardener did not receive a fair trial in violation of Article 8 of the American Convention on Human Rights, because the Counsel briefed by him prior to trial failed to appear at trial. He asked the Judge for an adjournment in order to obtain representation at trial, but that application was refused by the Judge. The Judge instead appointed a "Dock Brief" (hereinafter referred as "Counsel") to represent him at trial.

2. The Petitioner also alleged that his Counsel was not adequately prepared for his trial, did not take a statement from him, nor did he take his instructions on the Prosecution evidence at trial, and that "such instructions which were taken were taken from time to time whilst Mr. Gardener was in the dock." The petitioner further alleged that Mr. Gardener's Counsel "failed to cross-examine as to material instructions relating to the conduct of an identification parade to which Mr. Gardener was identified by a witness; failed to cross-examine on substantial discrepancies in the evidence of the identification witnesses (who gave markedly different accounts and one of whom in fact identified Mr. Gardener's co-accused as the gunman); failed to cross-examine or indeed to object to the "confrontation evidence;" and failed to call any evidence on behalf of Mr. Gardener despite express instructions to call alibi evidence."

3. Moreover, the Petitioner alleged, that Mr. Gardener's appeal to the Court of Appeal in Jamaica was conducted by Ms. Helen Birch who did not see Mr. Gardener prior to the hearing of the Appeal and consequently did not take his instructions upon it. The petitioner further alleged that Mr. Gardener was not present at the hearing of the Appeal and Miss Birch withdrew the Application for Leave to Appeal without instructions and contrary to Mr. Gardener's instructions. Consequently, the appeal was not argued, and Mr. Gardener's consent to this course was not obtained.

4. The Petitioner argued that Mr. Gardener has had no effective representation either at trial or before the Court of Appeal and thus has not had a fair trial within the meaning of Article 8.2c, d, f and h of the American Convention. The Petitioner contended that at the minimum, the concept of effective legal representation requires:

- (a) That a defendant charged with a serious offence should be represented by Counsel of his choice.
- (b) That he should have an opportunity to give full and proper instructions to that Counsel who in turn should have adequate opportunity to prepare the defence.
- (c) That all material witnesses should be called and in any event a material witness should be called whom a defendant wishes to be called.
- (d) That a defendant's instructions should be taken before the hearing of any appeal and in particular a Defendant's authority should be obtained to withdraw an appeal.
- (e) Statements alleged to have been made in a "confrontation exercise" by the defendant and his co-accused in the Police Station without any caution having been administered, should not be admitted at the trial.

5. The Petitioner argued that Mr. Gardener has been subjected to inhumane or degrading punishment or treatment in breach of Article 5 of the American Convention. It was almost five and a half years since the death sentence was imposed and almost three years since the Court of Appeal's decision. The Jamaican authorities have not taken any steps to carry out the execution since the sentence was passed. Mr. Gardener has been exposed to the mental anguish of alternating hope and fear inspired by the changing attitudes of the Jamaican Authorities to the implementation of sentence on those awaiting execution on death row. At times there existed a de facto moratorium. At other times, executions were scheduled for other prisoners and a threat of execution became real and terrible. The delay and uncertainty has increased for him, the suffering inevitably associated with the death sentence to the point where he has been exposed to an unnecessarily prolonged and cruel experience of mental anguish in anticipation of his punishment whilst located on death row.

6. The Petitioner further argued that the Judgment of the Judicial Committee of the Privy Council (ultimate Court of Appeal for Jamaica) in *Pratt v. Morgan* in November 1993 records that their Lordships came to the conclusion that "in any case in which execution is to take place more than five years after sentence, there will be strong grounds for believing that the delay is such as to constitute inhuman or degrading punishment or other treatment. If therefore, rather than waiting for all those prisoners who have been on death row under sentence of death for five years or more to commence proceedings pursuant to Section 25 of the Constitution, the Governor General now refers all such cases to the Judicial Committee of the Privy Council, who, in

accordance with the guidance contained in this advice recommends commutation to life imprisonment, substantial justice will be achieved swiftly and without provoking a flood of applications to the Supreme Court for constitutional relief pursuant to Section 17(1)."

7. Furthermore, the Petitioner argued that the delay in carrying out the death sentence has rendered the sentence itself unlawful and in breach of Articles 5.1 and 5.2 of the American Convention.

II. ARTICLES ALLEGEDLY VIOLATED

8. Articles 5.1, 5.2, 8.2c, d, f and h of the American Convention. Articles 7 and 10(1) of the International Covenant on Civil and Political Rights.

9. Article 5(1) provides:

Every person has the right to have his physical, mental, and moral integrity respected.[FN1]

[FN1] Basic Documents Pertaining to Human Rights in the Inter-American System, Updated to May 1996. Organization of American States, OEA/Ser.L.V/II.92, doc. 31 rev.3, May 3, 1996.

10. Article 5(2) provides:

No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."[FN2]

[FN2] Id.

11. Article 8 (2) provides:

Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:[FN3]

- c. adequate time and means for the preparation of his defense;[FN4]
 - d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;[FN5]
 - f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;[FN6]
 - h. the right to appeal the judgment to a higher court.[FN7]
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[FN3] Id.

[FN4] Id.

[FN5] Id.

[FN6] Id.

[FN7] Id.

12. Article 7 of the International Covenant on Civil and Political Rights (hereinafter "ICCPR") provides:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.[FN8]

[FN8] December 16, 1966, 999 U.N.T.S. 171.

13. Article 10 (1) of ICCPR provides:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.[FN9]

[FN9] Id.

III. PETITIONER REQUESTS THAT

14. The Commission finds that the Government of Jamaica has breached the alleged Articles of the American Convention in relation to Mr. Gardener.

IV. PROCEEDINGS BEFORE THE COMMISSION

A. Receipt of Documentary Materials

15. Upon receipt of the petition of May 10, 1994, and up to the presentment of the petition, the Commission has complied with the procedural requirements of its Regulations. It has studied, examined and considered all of the information submitted by the parties.

16. During this period the Commission communicated with the Government of Jamaica by notes. On June 30, 1994, it sent the pertinent parts of the petition, and additional information, including the Petitioner's Response dated April 27, 1995 to the Government of Jamaica with requests that it supply information which it deemed appropriate to the allegations of the complaint, and which addressed the issue of exhaustion of domestic legal remedies within 90 days and 30 days respectively. The Commission qualified these requests by stating that "the

request for information did not constitute a decision as to the admissibility of the communication." On February 28, 1995, the Commission received the Government of Jamaica's reply to the petition, dated February 22, 1995.

17. The Commission also communicated with the Petitioner by notes and forwarded the pertinent parts of the Government of Jamaica's Reply to Petitioner on March 8, 1995, whom it asked to supply it with observations, if any, within 30 days. On April 26, 1995, the Commission received the Petitioner's response dated April 21, 1995, to the Government's Reply to the petition. The Petitioner also submitted copies of the transcript pages of the Appeal Proceedings in the Appellate Court of Jamaica, with regard to Mr. Gardener, and his co-defendants, Mr. Murray and Mr. Delroy Chuck Criminal Appeal Nos. 216, 217, & 218/88, dated 8th & 15th April 1991. Ms. Helen Birch represented Mr. Gardener at the Appeal.

18. On January 13, 1997, the Commission received a note from the Government of Jamaica, dated January 13, 1997, which stated that "The Ministry of Foreign Affairs and Foreign Trade acknowledges receipt of the Petitioner's response to its comments. The delay in responding is due to the fact that the Petitioner's comments were only recently received. Having examined the Petitioner's response, the Ministry has decided not to make a reply at this time. The Ministry awaits the Commission's decision in this case."

B. The Legal Submission of the Parties

a) The Government of Jamaica's Reply to the Petition

19. The Government of Jamaica submitted a Reply to the petition which stated that "the Ministry wishes to assert that the communication is inadmissible for failure to exhaust domestic remedies as required by Article 46(1)(a) of the Convention. The author is entitled to appeal to the Judicial Committee of the Privy Council. Until he has done so, he has not exhausted all available domestic remedies and his communication is inadmissible."

20. The Government also stated that in "the interest of expediting the examination of the communication, the Ministry will now address the merits of the petition." The Government argued that "with respect to the alleged breaches of Article 5(1) and 5(2) by the detention of the author on death row for 5 1/2 years, the Ministry did not accept that this constitutes cruel and inhuman treatment. Delay of itself does not automatically constitute cruel and inhuman treatment even if it was a source of strain to convicted prisoners. Nor is the decision of Pratt and Morgan v. the Attorney General of Jamaica, authority for this view. Rather, the Ministry feels that each case must be examined on its merits according to the applicable legal principles in order to make the appropriate decision."

21. The Government further argued that "the author's allegations that Article 8(2)(c) and (d) were breached relate to the appointment and conduct of his legal aid attorney. The Ministry does not accept that the appointment of a dock brief constitutes a violation of Article 8(2)(c)(d). Further, the purported failures of counsel in conducting the case, e.g., failure to challenge the conduct of the identification parade at which the author was identified, failure to pursue discrepancies in the evidence of identification witnesses, failure of alibi are not matters which

can be attributed to the State. Once the State has not by act or omission interfered with counsel's conduct of his case, any shortcomings of such conduct are not the fault of the State any more than they would have been if counsel had been privately retained."

22. Moreover, the Government argued that "on the question of the circumstances of the author's appeal, investigations disclose no breaches of the Convention. A perusal of the Court of Appeal's records do not support the author's contention that his attorney withdrew the application for leave to appeal. The records indicate that the application for leave was dismissed, which is different. Similarly, the records indicate that the author was visited by his legal aid attorney."

b) Petitioner's Response to Government's Reply

23. The Petitioner stated that Mr. Gardener petitioned the Judicial Committee of the Privy Council for special leave to appeal. His petition was dismissed following a hearing on January 20, 1994. The Petitioner argued that the United Nations Human Rights Committee has held that, "in the absence of legal aid, a constitutional motion does not constitute an available remedy" - Lynden Champagnie, Delroy Palmer and Oswald Chisolm.[FN10]

[FN10] Communication No. 445/1991.

24. The Petitioner further argued that in the case of Pratt & Morgan -v- Attorney General of Jamaica, the Judicial Committee of the Privy Council (hereinafter "JCPC") held: "...in any case in which execution is to take place more than five years after sentence, there will be strong grounds for believing that the delay is such as to constitute inhuman and degrading punishment or other treatment." The JCPC also held that a state: "Must accept the responsibility for ensuring that execution follows as swiftly as practical after sentence, allowing a reasonable time for appeal and considering of reprieve. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delays and not the prisoner who takes advantage of it. The JCPC adopted the principles laid down in numerous other countries including the United States of America in the case of Richmond -v- Lewis;[FN11] Canada - in the case of Kindler -v- Canada;[FN12] in the European Court of Human Rights - Soering -v- United Kingdom;[FN13] as well as in previous decisions of the JCPC - Abbot -v- Attorney General of Trinidad & Tobago."[FN14]

[FN11] 948 F 2d 1473(1990).

[FN12] 67 CCC (3d)1, (1991).

[FN13] 11 EHRR 439, (1989).

[FN14] 1 WLR 1342 (1979).

25. Moreover, the Petitioner submitted that "Mr. Gardener who has been held on death row for over 6 years has been subject to inhuman and degrading treatment or punishment in violation of Articles 7 and 10 (1) of the International Covenant on Civil and Political Rights."

26. In addition, the Petitioner argued that "while the short comings of a privately appointed lawyer cannot be attributed to the state party, the failings of Counsel assigned through legal aid should be so attributed since effective legal assistance must be available in capital cases. Where Counsel fails to inform the Defendant that he intends to withdraw an appeal or can see that it has no merit, effective representation within the meaning of article 14(3) (d) of the Covenant has not been provided - Collins -v- Jamaica.[FN15]"

[FN15] Communication No. 356/1989 UNHR Committee.

27. Finally, the Petitioner stated that "relevant parts of the transcript are attached to show that the author's Attorney informed the Court of Appeal that "after a very careful perusal of the record, she found no meritorious ground to argue on behalf of the applicant Gardener." She thereby effectively destroyed the appellant's prospect of appeal."

V. ISSUE ON ADMISSIBILITY

28. Article 46 (1) of the American Convention specifies the criteria for the admission of a petition by the Commission. The only issue with regard to admissibility which is contested by the parties, is the issue of exhaustion of domestic remedies pursuant to Article 46(1)(a) of the American Convention. Therefore, the Commission need only make a finding as to whether remedies under domestic law in Jamaica, have been pursued and exhausted by Mr. Gardener, in accordance with generally recognized principles of international law, pursuant to Article 46(1)(a) of the American Convention.

VI. ANALYSIS

29. Article 46 (1) of the American Convention states "Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:

a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law."

30. This petition was filed pursuant to Article 44 of the American Convention.[FN16] The Commission finds that upon examination and consideration of the record before it, the domestic remedies of Jamaica have been pursued and exhausted by Mr. Gardener, in accordance with Article 46 of the American Convention, for the following reasons: First, Mr. Gardener was convicted, and sentenced to death for a capital offence. He appealed to the Court of Appeal in Jamaica and the copies of the pages of the appeal transcript reflect the date of the appeal proceedings on "8th & 15 April 1991, in the Court of Appeal in Jamaica, Supreme Court Criminal Appeal No: 216, 217, & 218/88."

[FN16] Article 44 states "any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." *Id.* Basic Documents.

31. Second, in the Government of Jamaica's Reply to the petition dated February 22, 1995, it argued that "the Ministry wishes to assert that the communication is inadmissible for failure to exhaust domestic remedies as required by Article 46 (1)(a) of the Convention. The author is entitled to appeal to the judicial Committee of the Privy Council. Until he has done so, he has not exhausted all available domestic remedies and his communication is inadmissible." The Petitioner rebutted this argument by arguing in its response dated April 21, 1995, that: "The appellant petitioned the Judicial Committee of the Privy Council for Special leave to appeal. His petition was dismissed following a hearing on 20th January 1994." The Petitioner further argued that: "The United Nations Human Rights Committee has held that, in the absence of legal aid, constitutional motion does not constitute an available remedy - Lynden Champagnie, Delroy Palmer and Oswald Chisolm." [FN17]

[FN17] Communication No. 445/1991.

32. Third, the record reflects that the Government of Jamaica chose not to respond to the Petitioner's argument with regard to its statement that "Mr. Gardener appealed to the Judicial Committee of the Privy Council for special leave to appeal, and that his petition was dismissed following a hearing on 20th January, 1994." Nor has the Government of Jamaica raised any argument concerning the Petitioner's argument that "the United Nations Human Rights Committee has held that, in the absence of legal aid, a constitutional motion does not constitute an available remedy." [FN18]

[FN18] *Id.* (Lynden Champagnie et al.)

33. Finally, the record reflects that the Commission sent a note, and forwarded the pertinent parts of the Petitioner's Response to the Government of Jamaica's Reply, to it, on April 27, 1995, requesting it to "take whatever measures are deemed necessary so that the Commission may receive all of the information relevant to this case within 30 days of receipt." The Commission reiterated this request by notes, on July 24, 1995, and September 26, 1996. However, on January 13, 1997, the Commission received a note dated January 13, 1996, which informed the Commission that *inter alia*, "Having examined the Petitioner's response, the Ministry has decided not to make a reply at this time. The Ministry awaits the Commission's decision in this case."

34. The Commission therefore finds, that the Government of Jamaica chose not to submit further arguments to refute the Petitioner's contention that Mr. Gardener has pursued and

exhausted the domestic remedies in Jamaica because he appealed both to the Court of Appeal in Jamaica and the Judicial Committee of the Privy Council in London, United Kingdom.

35. Conclusion: Therefore, the Commission finds that the Petitioner has established that Mr. Gardener has pursued and exhausted the domestic remedies in Jamaica, in accordance with generally recognized principles of international law pursuant to Article 46(1)(a) of the American Convention.

BASED ON THE FOREGOING REASONS, THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS CONCLUDES THAT:

36. This case is admissible pursuant to Article 46 (1)(a) of the American Convention.

37. This Report will be transmitted to the parties.

38. Both parties should submit additional legal submissions, if any, to the Commission with regard to the merits of the petition within 30 days.

39. This Report will be published in its Annual Report to the General Assembly of the OAS.